FRANS HIU

v.

PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
BALIA YUSOF WAHI JCA
ZAKARIA SAM JCA
[CRIMINAL APPEALS NO: B-05-268-11-2012
& B-05-269-11-2012]
8 OCTOBER 2014

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Prima facie case - Whether established - Deceased and appellants involved in brawl - Post mortem revealed several wounds, scratches and bruises on deceased's body - Whether there was evidence that injuries suffered by deceased were inflicted or caused by appellants - Whether injuries caused by deceased's own act - Cause of death - Whether conclusive - Defence - Private defence - Deceased attacked appellants - Whether there was reasonable cause of apprehension of danger to appellants - Whether appellants justified in their actions - Whether there was proper evaluation of defence - Whether conviction safe*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Setting aside - Whether there was proper evaluation of evidence - Whether trial judge had misconstrued defence adduced - Trial judge's failure to make specific finding under s. 300 Penal Code - Whether conviction and sentence should be set aside*

The appellants were jointly charged under s. 302 of the Penal Code for the murder of one Khartic Rajah ('the deceased'). On 3 December 2010, at about 10.15am, the deceased was seen walking unsteadily, swaying and pounding at the shops of the neighbourhood. The deceased had managed to break the door of one of the shops and was seen entering the shop. The appellants and one SP10 were asleep when suddenly a loud knocking on the door was heard. Suddenly, the deceased had plummeted from the ceiling. The first appellant approached the deceased and questioned him and the deceased had instantly attacked the first appellant. The second appellant had also confronted the deceased while SP10 ran to one of the windows facing the main street and jumped out. As SP10 was jumping off the window, he saw that the two appellants and the deceased were in a brawl. The post

A mortem conducted on the deceased revealed that he had died of "generalised blunt trauma". The trial judge found a *prima facie* against the appellants and called upon them to enter their defence. The appellants' defence was one of private defence and nothing was an offence which was done in the exercise of the right of
B private defence. The trial judge, however, found that both the appellants had failed to cast a reasonable doubt on the prosecution's case, saying that the defence was a mere denial; and further found that the defence of private defence did not apply. Hence, this appeal. The appellants submitted that (i) there was no
C evidence that the injuries suffered by the deceased were inflicted or caused by the appellants; (ii) the trial judge had failed to sufficiently consider the cause of death; (iii) the trial judge had failed to consider the exceptions to s. 300 of the Penal Code; and (iv) there was no proper evaluation of the defence.

D

Held (allowing appeal; setting aside conviction and sentence) Per Balia Yusof Wahi JCA delivering the judgment of the court:

E **(1)** The pathologist ('SP14') had given a detailed account as to the state of health of the deceased. He had a 60% blockage of his heart and had a liver and kidney infection. SP14, in his evidence, concluded that the cumulative effect of these ailments together with the bruises suffered would have led to
F his death. The deceased suffered a total of 17 wounds, scratches and bruises on his body but they were all superficial wounds. It was never established as to which of the numerous injuries suffered by the deceased were caused by the appellants, bearing in mind that the deceased had earlier fallen from the ceiling. He was also seen kicking and banging at the
G doors of the neighbouring shophouses in a drunken state. In that respect, the wounds referred to as bruises in the post mortem report, could very well have been caused by the deceased's own act and by the fall from the ceiling. Thus, the evidence of SP14 on the cause of death was inconclusive.
H Further, as to the trial judge's finding that "the two together intended to cause injuries to the deceased that inevitably led to his death", this was against the weight of evidence. SP14 had verily stated that the deceased suffered superficial wounds on the outside and none were found internally and not fatal.
I The trial judge had failed to sufficiently consider the issue of the cause of death. (paras 14, 17, 20, 21 & 22)

(2) The right of private defence commences as soon as there is a reasonable apprehension of danger to the body of a person and that right continues for as long as the danger exists. The appellants ought to be given the benefit of the right of private defence. Evidence showed that the deceased was the aggressor and was intruding into the appellants' room. Evidence also showed that the deceased was behaving and acting menacingly upon being confronted and asked by the appellants by his intrusion. There was a reasonable cause of apprehension of danger to the appellants' bodies which justified the appellants to act in the manner they did. Both the appellants had no recourse to the protection of the public authority. The law does not expect the appellants to be attacked first before they could retaliate. (paras 25, 27, 29 & 31)

(3) The trial judge had not only failed to consider sufficiently the defence put forward by the appellants but had also misconstrued the appellants' defence. The duty of the court is to consider whether the conviction is right and in so doing, the correct approach is to consider whether the conviction is a safe one (*Mohd Johi Said & Anor v. PP*, refd). The conviction of the appellants was thus unsafe. (paras 34 & 35)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah dituduh bersama di bawah s. 302 Kanun Keseksaan kerana membunuh Khartic Rajah ('si mati'). Pada 3 Disember 2010, pada pukul 10.15 malam, si mati telah dilihat berjalan secara tidak stabil, dengan terhuyung-hayang dan menghentam-hentam kedai-kedai di kawasan itu. Si mati berjaya memecahkan pintu sebuah kedai dan dilihat memasuki kedai itu. Perayu-perayu dan SP10 sedang tidur apabila mereka terdengar ketukan yang kuat di pintu. Tiba-tiba, si mati telah menjunam turun dari siling. Perayu pertama menghampiri si mati dan menyoalnya tetapi si mati dengan serta merta telah menyerangnya. Perayu kedua juga telah berhadapan dengan si mati manakala SP10 telah berlari ke salah satu tingkap yang menghadap jalan utama dan melompat keluar. Semasa SP10 terjun dari tingkap, dia melihat kedua-dua perayu dan si mati sedang bergaduh. Bedah siasat yang dijalankan ke atas si mati menunjukkan bahawa dia telah meninggal dunia akibat "generalised blunt trauma". Hakim bicara mendapati satu kes *prima facie* terhadap perayu-perayu dan

telah memanggil mereka untuk membela diri. Pembelaan perayu-perayu adalah berdasarkan pembelaan hak pertahanan persendirian kerana tiada kesalahan berlaku jika bertindak atas hak mempertahankan diri. Hakim bicara, walau bagaimanapun, mendapati bahawa kedua-dua perayu telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dengan menyatakan bahawa pembelaan hanyalah penafian semata-mata; dan selanjutnya mendapati bahawa pembelaan pertahanan persendirian tidak boleh digunapakai. Oleh itu, rayuan ini. Perayu-perayu berhujah bahawa (i) tiada keterangan dikemukakan bahawa kecederaan yang dialami si mati telah disengajakan atau disebabkan oleh perayu-perayu; (ii) hakim bicara telah gagal untuk mempertimbangkan dengan secukupnya punca kematian; (iii) hakim bicara telah gagal untuk mempertimbangkan pengecualian kepada s. 300 Kanun Keseksaan; dan (iv) tiada penilaian yang betul dibuat terhadap pembelaan yang dikemukakan.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman)

Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Pakar patologi ('SP14') telah memberikan keterangan secara terperinci berkenaan keadaan kesihatan si mati ('SP14'). Jantung si mati adalah 60% tersumbat dan dia juga mempunyai jangkitan hati dan buah pinggang. SP14, dalam keterangannya, membuat kesimpulan bahawa kesan kumulatif penyakit-penyakit tersebut berserta dengan lebam yang dialaminya akan membawa kepada kematiannya. Si mati mengalami sejumlah 17 luka, kesan cakaran dan lebam-lebam atas badannya tetapi ia adalah luka-luka superfisial. Tidak pernah dibuktikan kecederaan mana yang dialami si mati yang telah disebabkan oleh perayu-perayu, mengambil kira juga bahawa si mati telah terlebih dahulu jatuh dari siling. Dia juga telah dilihat menendang dan mengetuk pintu kedai-kedai di kawasan itu dalam keadaan mabuk. Dengan itu, luka-luka yang dirujuk sebagai lebam dalam laporan bedah siasat, boleh disebabkan oleh tindakan si mati sendiri dan oleh kerana dia telah terjatuh dari siling. Oleh itu, keterangan SP14 berkenaan punca kematian adalah tidak muktamad. Selanjutnya, berkenaan dapatan hakim bicara bahawa "kedua-dua perayu telah berniat untuk menyebabkan kecederaan kepada si mati yang telah mengakibatkan kematiannya" didapati adalah bertentangan

dengan keterangan yang dikemukakan. SP14 telah menyatakan bahawa si mati telah mengalami luka-luka superfisial pada bahagian luaran dan tiada kecederaan dijumpai di bahagian dalaman dan tidak membawa maut. Hakim bicara telah gagal untuk mempertimbangkan secara teliti isu punca kematian.

(2) Hak pembelaan pertahanan persendirian bermula sebaik sahaja terdapat kefahaman yang munasabah bahawa wujudnya keadaan bahaya kepada tubuh badan seseorang dan hak itu berterusan selama keadaan bahaya itu wujud. Perayu-perayu seharusnya diberikan manfaat hak pembelaan pertahanan persendirian. Keterangan menunjukkan bahawa si mati adalah penyerang dan telah mencerobohi bilik perayu-perayu. Keterangan juga menunjukkan bahawa si mati telah berkelakuan dan bertindak secara mengancam apabila berhadapan dan disoal oleh perayu-perayu dengan pencerobohannya. Terdapat sebab kebimbangan yang munasabah ke atas tubuh badan perayu-perayu yang menjustifikasikan perayu-perayu bertindak mengikut cara mereka bertindak. Kedua-dua perayu tidak mempunyai rekursa kepada perlindungan pihak berkuasa awam. Undang-undang tidak menjangkakan perayu-perayu diserang dahulu sebelum mereka boleh membalas.

(3) Hakim bicara tidak hanya gagal mempertimbangkan pembelaan yang dikemukakan oleh perayu-perayu secara teliti tetapi telah juga menyalahtafsirkan pembelaan perayu-perayu. Tanggungjawab mahkamah adalah untuk mempertimbangkan sama ada sabitan adalah betul dan dalam berbuat demikian pendekatan yang betul adalah untuk mempertimbangkan sama ada sabitan adalah selamat (*Mohd Johi Said & Anor v. PP*, dirujuk). Sabitan perayu-perayu adalah, dengan itu, tidak selamat.

Case(s) referred to:
Beckford v. R [1987] 3 All ER 425 ***(refd)***
Darshan Singh v. State Of Punjab AIR 2010 SC 1212 ***(refd)***
Govindan v. State of Kerala [1960] 47 AIR 258 ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
Mohd Khan v. State of Madhya Pradesh [1972] Cri LJ 661 ***(refd)***
PP v. Dato' Balwant Singh (No 2) [2003] 7 CLJ 285 HC ***(refd)***
PP v. Ngoi Ming Sean [1981] CLJ 93; [1981] CLJ (Rep) 251 HC ***(refd)***
Ya Daud v. PP [1996] 2 CLJ 540 HC ***(refd)***

Legislation referred to:
Penal Code, ss. 34, 96, 99, 106, 300(b), (c), 302

Other source(s) referred to:
Russel on Crime, 11th edn, vol 1, p 491

For the appellants - Gooi Soon Seng (Azura Alias & Choong Kak San with him); M/s Gooi & Azura
For the prosecution - Andi Razalijaya, DPP

[Editor's note: For the High Court judgment, please see PP v. Frans Hiu & Anor [2012] 1 LNS 908.]

Reported by Suhainah Wahiduddin

JUDGMENT

Balia Yusof Wahi JCA:

[1] The High Court Judge at Shah Alam had found the two appellants herein guilty of killing one Khartic a/l Rajah. They were jointly charged under s. 302 of the Penal Code and both were found guilty and sentenced to death.

[2] Against the said conviction, each of the appellant had filed separate appeals to the Court of Appeal. We heard the two appeals together at the end of which we unanimously allowed their appeals, set aside the conviction and sentence and set them free.

[3] We now give our reasons.

Facts

[4] The facts of the case are as follows. In the morning of 3 December 2010 at about 10.15am, one Chu Kong Yun (SP5) saw a shirtless Indian man ('the deceased') walking in the neighbourhood. SP5 described him to be walking unsteadily, swaying and pounding at the shops. He also described the man to be behaving in an aggressive manner and in a fit of ill tamper. He was unarmed. SP5 asked the deceased what and who was he looking for, and the deceased told him to mind his own business. SP5 carried on washing his car and continued observing the deceased. The deceased was again seen pounding at the doors from one shop to another and finally managed to break the door of one them. The deceased was seen entering the shop and SP5 heard a loud noise from inside which sounded like breaking of a chair. The double-storey shop was rented by Tock Chee Soon

('SP7'), in which gambling machines were placed on the ground floor. Three workers namely, Leong Wai Yau ('SP10'), the first appellant (the appellant in Appeal No: B-05-268-11-2012) and the second appellant (the appellant in Appeal No: B-05-269-11-2012), occupied the upper floor as their living quarters.

[5] SP10 testified that he and the appellants were still asleep when suddenly a loud knocking on the door was heard. SP10 and the two appellants were under the impression that it could be a police raid and were scared to open the door. Suddenly, the deceased plummeted from the ceiling. The first appellant approached the deceased and questioned him. The deceased heaved up from his fall and in an instant attacked the first appellant. SP10 said his thought was to run downstairs and get some help. Meanwhile, he saw the second appellant confronting the deceased. SP10 tried to unlatch the door but failed. He ran to one of the windows facing the main street and jumped out. As he was jumping off the window, SP10 saw that the three were in a brawl. There was no other witness to the crime.

[6] The post mortem conducted on the deceased revealed that he had died of "generalized blunt trauma". The pathologist (SP14) stated there were superficial bruises and abrasions, but not deep enough to result in any internal injuries. SP14 found a total of 17 wounds, mainly scratches and bruises on the deceased's body. He explained that, in this instance, death was not caused by the wounds or abrasions but rather the excruciating pain felt, caused by the wounds. In addition, SP14 also noted there was a 60% blockage of the deceased heart, liver and kidney infection and reddish colouring of the heart, the cumulative effect of which would have lead to his death.

[7] A toxicologist, SP12 was also called by the prosecution who testified that on analysis, she found the blood of the deceased to contain 0.60 microgram per millilitre of methamphetamine and the same substance was also detected in his urine. SP12 further said that by consuming an amount which is above the range of 0.1 to 0.5, would be toxic, and in the instant case, the deceased was well above the safe/moderate range. Since methamphetamine is a catalyst substance, it may accelerate the blood pressure causing irrationality in behaviour by being aggressive, daredevil and over confident.

[8] The learned trial judge found a *prima facie* case against the appellants and called upon them to enter their defence.

The Defence Case

[9] The first appellant who was the first accused in the court below, gave evidence that on that fatal morning he was asleep on the upper floor of the shop house together with the second appellant and SP10. They were awakened by a loud noise of someone banging the door. They were under the impression that it could be a police raid. Suddenly, the deceased fell from the ceiling. The first appellant approached the deceased and asked him as to the reason of his intrusion. The deceased suddenly got up and attacked the first appellant. The deceased beat him about four to five times. He was shocked and fell. In the meantime, he saw his brother ('second appellant') and SP10 going for the door in order to escape. The deceased then took a white plastic chair and continued to attack him. The first appellant further testified that he then grabbed the deceased's waist to prevent a further attack. He did so in self-defence.

[10] The second appellant testified that after SP10 and he failed to open the door, they went back to the room and SP10 took a leap from the window. The second appellant did not follow SP10 as he was scared that he would injure himself. The second appellant saw the deceased attacking his brother with a plastic chair and he went to help. However, he found the deceased had already collapsed.

[11] The learned trial judge found that both the appellants had failed to cast a reasonable doubt on the prosecution's case saying that the defence is a mere denial; and further found that the defence of private defence does not apply.

The Appeal

[12] Mr Gooi Soon Seng, learned counsel for the appellants, at the very outset submitted that the learned trial judge had erred in calling for the defence, and he submitted that no *prima facie* case had been established against the appellants. There was no evidence that the injuries suffered by the deceased were inflicted or caused by the appellants. The learned judge had also failed to sufficiently consider the cause of death. As to the appellants'

defence, it was submitted that there was no proper evaluation of the defence and further there was also the failure on the part of the trial judge to consider the exceptions to s. 300 of the Penal Code.

[13] We have considered the issues raised by the appellants' learned counsel and the submissions in reply by the learned Deputy. We found merits in the appellants' counsel's submission on the issue of the learned trial judge's consideration of the appellants' defence and as to the cause of death.

[14] SP14, the pathologist gave a detailed account as to the state of heath of the deceased. He had a 60% blockage of his heart, had liver and kidney infection and reddish colouring of the heart. SP14, in his evidence concluded that the cumulative effect of these ailments together with the bruises suffered would have led to his death. The cause of death was stated to be "generalized blunt trauma". The deceased suffered a total of 17 wounds, scratches and bruises on his body but they are all "superficial wound on the outside and none found internally and not fatal". SP14 explained that certain classes of persons who has a low tolerance to withstand pain, may feel the pain to be so excruciating and may result in death. SP14 further emphasised that death in the instant case was not caused by the wounds or abrasions but by pain felt caused by the wounds.

[15] The learned trial judge had at first considered whether the appellants caused the death of the deceased by causing bodily injury which is sufficient in the ordinary cause of nature to cause death under s. 300(c) of the Penal Code. However, after having considered the fact that the deceased also suffered other infirmities and died from injuries which would not have killed an ordinary person. The learned trial judge pondered that "the deceased suffered from bodily injuries and evidently both accused intended the bodily injuries, but was it likely to cause death" (see, p. 376 rekod rayuan jilid 4). Intending to cause bodily injury to be likely to cause death comes under s. 300(b) of the Penal Code. Having said so, the learned trial judge concluded at p. 377 of the same:

> Based on the circumstantial evidence, the court may conclude that the two together intended to cause injuries to the deceased that inevitably lead to the deceased's death.

[16] We agree with the learned counsel for the appellants that this finding is wholly unsatisfactory. The learned trial judge had failed to make a specific finding as to which limb of s. 300 of the Penal Code the appellants were guilty of. Clearly, the learned trial judge had considered s. 300(b) and (c) of the Penal Code but had failed to make a finding as to which of those provisions the court had relied upon in finding the appellants guilty of the offence of murder.

[17] As to causation, it has never been established by the prosecution as to which of those numerous injuries suffered by the deceased were caused by the appellants, bearing in mind that the deceased had earlier fallen from the ceiling and much earlier he was seen knocking and banging at the doors of the neighbouring shophouses in a state of "dalam keadaan mabuk" as stated by SP5. The deceased finally broke the door of the shophouse and must have climbed to the ceiling before falling off and surprising the appellants. In that respect, the wounds referred to as "luka calar" and bruises (lebam) in the post mortem report, could very well have been caused by the deceased's own act and by the fall from the ceiling. This has not been addressed by the learned trial judge.

[18] The learned trial judge had also found on the evidence of SP14 that "the deceased suffered from a heart problem in which his blood vessels are clogged. That the deceased had got into a fight with both the appellants and such aggressive state could have triggered a heart attack and thus the death of the deceased had direct nexus with both accused". (see p. 377-378 rekod rayuan jilid 4).

[19] We have scrutinised the evidence of SP14 with a fine toothcomb but we were not able to find anything to suggest that the deceased had suffered a heart attack. When asked by the learned Deputy Public Prosecutor to explain his finding on the cause of death, SP14 stated as follows:

> Q : Cuba Doktor lihat laporan bedah siasat yang Doktor keluarkan. Boleh Doktor nyatakan setelah Doktor jalankan bedah siasat ke atas mayat tersebut, boleh Doktor beritahu mahkamah sebab kematian mangsa tersebut?
>
> A : Saya telah membuat kesimpulan bahawa sebab kematian si mati ini adalah sebagaimana generalized blunt trauma.

Q : Boleh Doktor terangkan dengan lebih lanjut apa yang dimaksudkan dengan generalized blunt trauma? A

A : Saya tidak dapat memberikan satu sebab yang fokus sebab ia hanya mempunyai lebam dan calar yang umum di badan tetapi dalaman tidak ada kecederaan, ada tanda-tanda jantung yang agak lemah dengan adanya jangkitan paru-paru dan juga buah pinggang. Tidak tahu bagaimana ia tidak cukup untuk menyatakan dia tiada ada pendarahan yang umum. Dia tidak ada penyakit jantung dan hati yang jelas, itu yang menyukarkan untuk membuat kesimpulan kecuali adanya kesan-kesan kepada badan yang umum menyeluruh tetapi kecil-kecil dan luka kecil-kecil. Tetapi ada orang yang tidak tahan dengan sakitnya dan rasa sangat sakit dan akan menyebabkan kematian. Sakit yang amat sangat, akibat rangsangan saraf yang teramat sakit dan ia mungkin dibantu oleh sumbatan pada jantung 60%, paru-paru juga ada tanda-tanda jangkitan hati ada juga menunjukkan jangkitan buah pinggang juga ada tanda kemerahan pada ventrikal jantung, mungkin itu yang sebab kematian yang satu itu tidak ada, ia adalah himpunan beberapa faktor yang menyumbangkan kepada kematian. B C D

Q : Adakah luka-luka atau lebam-lebam yang dialami oleh mangsa tidak menyumbang kepada kematian? E

A : Umumnya yang saya lihat luka itu bagi saya tidak fatal. Tetapi sakit akibat luka tersebut, itu yang berkemungkinan memberi sumbangan dan menyebabkan sebab kematian.

[20] In the light of the above, it appears to us that the evidence of SP14 on the cause of death is inconclusive. His evidence is very general and there could well be more than one cause of death. We may also add that his evidence is speculative. F

[21] As to the learned trial judges' finding that "the two together intended to cause injuries to the deceased that inevitably lead to his death", we are of the view that this is against the weight of evidence. SP14 had verily stated that the deceased suffered superficial wounds on the outside and none found internally and not fatal. The superficial wounds are the scratches and bruises. Again this begs the question whether all these wounds were caused by the appellants. G H

[22] We agree with the submissions of learned counsel that the learned trial judge had failed to sufficiently consider the issue of the cause of death. Such failure in our view is a misdirection and merits appellate intervention. I

[23] We have earlier reproduced the defence of the appellants as it was presented before the trial court. Having heard the defence story, the learned trial judge found:

> It is clear that the defence version was a direct contradictory of SP10's evidence. Both accused denied having attacked the deceased, or return a blow. They tried to paint a picture where the deceased collapsed mysteriously. It is a mere denial, and unfortunate as it seem, it is not a private defence.

[24] The defence of the appellants is one of private defence and nothing is an offence which is done in the exercise of the right of private defence. The law on the right of private defence may be found in various provisions of the Penal Code namely in ss. 96 to 106. The first appellant stated that the deceased had attacked him and he retaliated by hitting the deceased with a plastic chair. The second appellant after failing to find an escape route from the scene, went to help the first appellant who was his brother. But before he could do so, the deceased had already collapsed. In this respect, it is not right to say that the appellants denied attacking the deceased or return a blow as found by the learned trial judge.

[25] The right of private defence commences as soon as there is a reasonable apprehension of danger to the body of a person and that right continues for as long as the danger exits. (see *PP v. Ngoi Ming Sean* [1981] CLJ 93; [1981] CLJ (Rep) 251; [1982] 1 MLJ 24, *Ya Daud v. PP* [1996] 2 CLJ 540; [1997] 4 MLJ 322, *PP v. Dato' Balwant Singh (No 2)* [2003] 7 CLJ 285; [2003] 3 MLJ 395).

[26] Section 99 of the Penal Code provides a limitation to the right of private defence. If an accused person has time to have recourse to seek the protection of a public authority or inflicts more harm than necessary for the purpose of defending his person, he can not avail himself of the protection provided by the defence.

[27] Having considered the factual matrix of the case, it is our considered view that the appellants ought to be given the benefit of the right of private defence. The evidence shows that the deceased was the aggressor and was intruding into the appellants' room. The evidence also shows that the deceased was behaving and acting menacingly upon being confronted and asked by the appellants about his intrusion. The deceased was also much bigger in size compared to the appellants. He was in a state of rage, being high on drugs.

[28] The Indian Supreme Court in *Darshan Singh v. State Of Punjab* AIR 2010 SC 1212, in considering the law on private defence under the Indian Penal Code had enumerated the following principles at p. 1223 and 1224 as follows: A

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits. B

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation. C

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised. D

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension. E

(v) Is is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude. F

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self defence, it is open to consider such a plea if the same arises from the material on record. G

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(xi) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence. H

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened. I

[29] In our view, there was a reasonable cause of apprehension of danger to the appellants' body which justify the appellants to act in the manner they did. The law does not expect the appellants to be attacked first before they could retaliate. (See: *Beckford v. R* [1987] 3 All ER 425, *Govindan v. State of Kerala* [1960] 47 AIR 258). And as Augustine Paul J (as he then was) remarked in *PP v. Dato' Balwant Singh (No 2)* (*supra*) an accused person need not wait till he is actually attacked or inflicted with injury in order to react and he is not obliged to run away, for the law does not require a citizen to behave like a coward, citing *Mohd Khan v. State of Madhya Pradesh* [1972] Cri LJ 661.

[30] *Russel on Crime* (11th edn. vol. 1 p. 491) speaks of the scope and foundation of private defence thus:

> ... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable.

[31] Both the appellants had no recourse to the protection of the public authority. The evidence of SP10 and the second appellant show that both were desperately looking for an avenue to escape and SP10 had to jump out through the window. In the process, SP10 broke his left leg.

[32] On the use of a plastic chair as a weapon to defend himself, the first appellant can never in the circumstances of the case be held to have exceeded his right of private defence.

[33] As for the second appellant, there is not an iota of evidence to show that he had inflicted any injury on the deceased. SP10 being the sole witness to the crime, could not have known what had happened between the two appellants and the deceased after he had jumped out of the building. The second appellant was only implicated by virtue of being at the scene together with the first appellant and that they were charged together with the invocation of s. 34 of the Penal Code.

[34] The learned trial judge had in our view not only failed to consider sufficiently the defence put forward by the appellants but had also misconstrued the appellant's defence. It was not a denial as His Lordship had found and we also found that the defence evidence is not in direct contradiction (as the learned trail judge puts it) with the evidence of SP10. Our perusal of the evidence of SP10 and that of the appellants', fail to reveal any contradiction as found by the learned trial judge. The evidence adducted does not support the learned trial judge's finding. The finding made is unsustainable.

[35] We wish to reiterate that the duty of the court is to consider whether the conviction is right and in so doing the correct approach is to consider whether the conviction is a safe one (see: *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389). We found the conviction of the appellants to be unsafe. The appeal is allowed and we set aside the conviction and sentence passed by the High Court. The appellants are hereby acquitted and discharged of the offence and they are set free.